THE USE OF MAXIMS IN JURISPRUDENCE.

"Maxims are the condensed Good Sense of Nations." — SIR JAMES MACKINTOSH (Motto on titlepage of Broom's Legal Maxims).

"'*A maxime in law.*' A maxime is a proposition to be of all men confessed and granted without proofe, argument, or discourse." — *Co. Litt.* 67 *a.*

"Maxime, *i. e.*, a sure foundation or ground of art, and a conclusion of reason, so called *quia maxima est ejus dignitas et certissima authoritas, atque quod maxime omnibus probetur*, so sure and uncontrollable as that they ought not to be questioned." — *Co. Litt.* 10 *b*–11 *a.*

"It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and qualifications to them are more important than the so-called rules." — SIR J. F. STEPHEN: History of the Criminal Law of England, vol. 2, 94, note 1.

"We believe that not a single law maxim can be pointed out which is not obnoxious to objection." — TOWNSHEND on Slander and Libel, 4th ed., s. 88, p. 71, note 1.

HERE is certainly a remarkable difference of opinion. The truth is, that there are maxims and maxims; some of great value, and some worse than worthless. And the really valuable maxims are peculiarly liable to be put to a wrong use. A proposition, in order to gain currency as a maxim, must be tersely expressed. But the very brevity which gives it currency, also, in many instances, gives rise to misconception as to its meaning and application. A phrase intended to point out an exception may be mistaken for the enunciation of a general rule. An expression originally used only to state *a* truth may be mistaken for a statement of *all* truth; as comprising in half a dozen words a digest of the entire law on a given topic. As Agassiz was said to be able from the view of a single bone or scale to reconstruct the entire animal of which the fragment once formed a part, so jurists sometimes treat one brief maxim as containing all the materials needed to develop an entire subdivision of the law, "a complete pocket precept covering the whole subject." [1] How common it is to meet with decisions on important points, where the only hint at an expression of the *ratio decidendi* consists in the quotation, without comment, of a legal maxim! And, not unfrequently, a maxim implicitly relied on "as covering the entire subject" is one origi-

[1] 6 HARVARD LAW REVIEW, 437.

nally intended to have only a very limited application, and which "could only do duty as a general exposition by being strangely misinterpreted and strangely misapplied." [1]

Round numbers, it is said, are always false; and purely general criticisms are apt to be unfounded. Those who are wont to eulogize maxims may not unreasonably require their critics to "file a specification." In compliance with this request, we proceed to furnish specific criticisms of some specific maxims. And the objections to these maxims will be stated, so far as practicable, in the words of jurists of acknowledged reputation. One who has the temerity to attack popular idols can hardly expect even to obtain a hearing, much less to convince, if he relies solely on the views "evolved from his own inner consciousness." The convincing force, if any such there be, of this article will consist in its want of originality.

There are phrases, solemn and imposing in form, which seldom or never render any real assistance in the solution of a legal puzzle; but on the contrary actually retard that solution. They are mere truisms; or mere identical propositions; or moral precepts; or principles of legislation; but not working rules of law. "Such sentences are not a solution of a difficulty; they are stereotyped forms for gliding over a difficulty without explaining it." [2] And yet, being mistaken for solutions of the practical legal problem, their use has the effect of preventing a thorough investigation. Prominent in this class is the familiar maxim, *Sic utere tuo ut alienum non lædas*, and its companion phrase, *Qui jure suo utitur neminem lædit.* Perhaps no legal phrase is cited more frequently than *Sic utere, &c.* It is not uncommon for judges to decide important cases without practically giving any reason save the quotation of this maxim, which is evidently regarded by the court as affording, by its very terms, a satisfactory *ratio decidendi.* Yet in the vast majority of cases this use of the phrase is utterly fallacious.

"The maxim, *Sic utere tuo ut alienum non lædas*, is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits: so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous." [3]

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[1] 6 HARVARD LAW REVIEW, 437.

[2] 8 Am. Law Rev. 519.

[3] Erle, J., in Bonomi *v.* Backhouse, El. Bl. & El. 622, p. 643.

"The maxim, . . . , is no help to decision, as it cannot be applied till the decision is made."[1]

"*Sic utere tuo ut alienum non lædas:* how can this duty be understood without first knowing the meaning of *tuum* and injury?"[2]

"The attempts to solve these difficulties, which one meets with in ordinary law books, are merely identical propositions, and amount to nothing: *e.g.*, *Qui jure suo utitur neminem lædit.* If by *lædit* be meant damage or evil, it is false (and inconsistent with what immediately precedes); since the exercise of a right is often accompanied with the infliction of positive evil in another. If by *lædit* he meant *injury*, the proposition amounts to this; that the exercise of a right cannot amount to a wrong: which is purely identical and tells us nothing; since the thing we want to know is 'what is right? (or what is that which I may do without wrong?); and what is wrong? (what is that which would not be an exercise of my own right, inasmuch as it would amount to a violation of a right in another?).'"

"The same observations are applicable to *Sic utere tuo ut alienum non lædas.*"[3]

"The maxim, *Sic utere tuo ut alienum non lædas*, is iterated and reiterated in our books, and yet there is scarcely an aphorism known to the law the true application of which is more vague and undefined. Interpreted literally it would enjoin a man against any use of his own property which in its consequences might injuriously affect the interests of others; but no such legal principle ever existed."

"While, therefore, *Sic utere tuo*, &c., may be a very good moral precept, it is utterly useless as a legal maxim. It determines no right; it defines no obligation."[4]

"The maxim *Sic utere tuo ut alienum non lædas*, as commonly translated ('So use your own as not to injure another's'), is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes. But strictly, even then, it can mean only, 'So use your own that you do no legal damage to another's.' Legal damage, actionable injury, results only from an unlawful act. This maxim also assumes that the injury results from an unlawful act, and paraphrased means no more than: 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act,' or 'Injury from an unlawful act is actionable.' This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful. It amounts to no

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[1] Sir Wm. Erle, in Brand *v.* H. & C. R. Co., L. R. 2 Q. B. 223, p. 247.

[2] 2 Austin on Jurisprudence, 3d ed. 795.

[3] 2 Austin on Jurisprudence, 3d ed. 829.

[4] Seldon, J., in Auburn, &c. Co. *v.* Douglass, 9 New York, 444, p. 445, 446.

more than the truism: An unlawful act is unlawful. This is a mere begging of the question; it assumes the very point in controversy, and cannot be taken as a *ratio decidendi.*" [1]

Various defences of this maxim have been attempted.

It is said that the objection urged by Sir William Erle "may be made against all legal maxims and rules; none are absolute." [2]

Undoubtedly, every legal principle is frequently liable to be modified in its operation by the concurrent application of some other legal principle or principles. The effect of the particular principle is curtailed or extended (as the case may be) by bringing another principle into combination with it, "so that the two together will produce a result not within the terms of either one alone; as two diverse propelling forces, applied to an inert body, will send it to a point which neither one of itself would do." [3] "What is thought to be an exception to a principle, is always some other and distinct principle cutting into the former; some other force which impinges against the first force, and deflects it from its direction." [4] But a legal principle which deserves its place will always be of appreciable value in the solution of problems falling within its scope, whenever it is not controlled by some other principle which, under the circumstances of the case, is entitled to superior weight. And it is precisely here that the defence of this maxim labors. It is frequently used as affording a solution of a legal problem, which in fact it never solves.

It is also asserted that this maxim, though it may often have been made to do "extra legal duty," is, really, "indispensable in the place where it belongs, and that is in case of concurrent rights, whether equal or different in degree, in respect to the same property." "Here," it is said, "the maxim is the boundary, and does determine the right and define the obligation of the parties, as between each other, in the use of their respective estates." [5]

This argument is not well founded. The maxim does not, even in that class of cases, "determine the right or define the obligation of the parties, as between each other." At the utmost it merely asserts that certain rights of property are not absolute but relative, that the right of one man is limited by the correlative

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[1] Ingersoll, Sp. J., in Payne *v.* W. & A. R. Co., 13 Lea, Tennessee, 507, p. 527, 528.
[2] 1 Am. Law Rev. 5.
[3] Bishop on Written Laws, s. 118*a*.
[4] Mill on Logic, Harper's ed. of 1850, p. 259.
[5] 7 Alb. Law Journal, 32.

right of another. But it does not tell us how far, or to what extent, the limitation goes. If it be said (as seems to be practically asserted in one quarter) that it is impossible to give any serviceable, working definition of these correlative rights, why not frankly confess the impotency of the law in this regard, instead of deluding people into the belief that the law furnishes, in this maxim, a rule capable of easy and definite application? If this maxim means only, "Do not take more than your share of a common right," why parade it as solving the question what that share is? Say, if you please, as one court has virtually said, that the question is one of reasonableness of use, and that this is a question of fact for a jury.[1] But does it follow that the recitation of the *sic utere* maxim by the judge will constitute an all-sufficient guide to the jury?

Of what value, then, is this maxim; what reason is there for retaining it in the law books?

Professor Terry answers: It belongs to the class of "extra-legal principles — which we may call legislative, because they serve as guides to show how the law ought to be made. . . . Much the greater part of the work of the courts has been done by taking what were really extra-legal principles, of justice or policy proper for the consideration of the Legislature, treating them as rules of law, and then, under the pretence — not always consciously false — of interpreting them and applying them to particular cases, making new rules of law based upon them. . . . If we . . . take up any collection of legal maxims, we shall find that many, perhaps most, express principles of legislation rather than law. . . . The familiar maxim, *Sic utere tuo ut alienum non lædas*, is another one of the same character. There cannot be said, I think, to be any general rule of law forbidding a person to cause damage to another by the manner in which he exercises his own rights. But the principle expressed in the maxim has been the guiding principle in the evolution of many more special rules forbidding various kinds of conduct which are likely to produce harm to others."[2]

Again, there are maxims, which, if true at all, are true only in a partial sense, and which must be essentially limited in their application. Yet these maxims are frequently cited as if literally true and universally applicable. Take, for instance, the phrase, *Equitas*

[1] Swett *v.* Cutts, 50 N. H. 439; Bassett *v.* S. M. Co., 43 N. H 569; Rindge *v.* Sargent, 64 N. H. 294.

[2] Terry's Leading Principles of Anglo-American Law, ss. 10, 11.

sequitur legem, which is sometimes quoted as if it possessed "a supreme and controlling efficacy."

This rule "if followed literally, would leave nothing for the courts of equity to perform."[1] But in fact "the main business of equity is avowedly to correct and supplement the law."[2] "The qualification of this maxim is nothing less than the entire system of juridical equity itself, both jurisprudence and procedure, based, as has been seen, upon the theory that equity does not follow the law where the law does not follow justice or the public convenience."[3] Equity follows the law in its rules of decision only "when it does not choose to follow differing rules of its own."[4]

"Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. . . . One large division of the equity jurisprudence lies completely outside of the law; it is additional to the law; and while it leaves the law concerning the same subject-matter in full force and efficacy, its doctrines and rules are constructed without any reference to the corresponding doctrines and rules of the law. Another division of equity jurisprudence is directly opposed to the law which applies to the same subject-matter; its doctrines and rules are so contrary to those of the law that when they are put into operation the analogous legal doctrines and rules are displaced and nullified. As these conclusions cannot be questioned, it is plain that the maxim, 'Equity follows the law,' is very partial and limited in its application, and cannot . . . be regarded as a general principle."[5]

There are historical reasons which account for the frequent use of this maxim in early times.[6] And there are, undoubtedly, cases, neither few in number nor unimportant, where courts of equity follow common law analogies.[7] But "the maxim is, in truth, operative only within a very narrow range; to raise it to the position of a general principle would be a palpable error."[8]

It is hardly too much to say that, at the present day, there is as much ground for asserting the reverse of this maxim as for assert-

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[1] 2 Austin on Jurisprudence, 3d ed. 668.

[2] Phelps' Juridical Equity, s. 237.

[3] Phelps' Juridical Equity, s. 239.

[4] 1 Bishop, Law of Married Women, s. 16.

[5] 1 Pomeroy's Equity Jurisprudence, 1st ed. s. 427.

[6] See Phelps' Juridical Equity, s. 237; also 1 Pomeroy's Equity Jurisprudence, 1st, ed. s. 425.

[7] 1 Pomeroy's Equity Jurisprudence, 1st ed. ss. 425, 426.

[8] 1 Pomeroy's Equity Jurisprudence, 1st ed. s. 427.

ing the maxim itself. *Lex sequitur equitatem* would apply about as often as *Equitas sequitur legem.* Many doctrines of the modern common law "seem grounded on the fact that similar decisions had previously been made in courts of equity." It is impossible to deny "the constant progress of law in the direction of equity under the superior attractive force of the latter;"[1] a tendency the existence and justice of which found recognition in the provision of the English Judicature Act of 1873: That when equity and common law conflict, equity shall prevail.[2] Indeed, the adoption by the common law of many doctrines which were originally purely equitable, has been so complete that it has often been seriously, though unsuccessfully, contended that the jurisdiction originally exercised by courts of equity in like cases should now be regarded as abrogated.[3]

If there is one maxim cited more frequently than another as being both fundamental in its nature and universal in its applicability, it is the phrase, *Actus non facit reum, nisi mens sit rea;* or, as it is sometimes expressed, *Non est reus, nisi mens sit rea.* No less a personage than the late Chief-Justice Cockburn affirmed that this maxim "is the foundation of all criminal justice."[4] Yet even this phrase has been severely criticised by a judge who had made a specialty of criminal law. And his comments from the bench cannot be regarded as mere sparks struck off in the heat of discussion; for the substance of his views had already been given in an elaborate work, published six years before his judicial utterance. In Regina *v.* Tolson, decided in 1889,[5] Mr. Justice Stephen said: "Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a '*mens rea*,' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. '*Mens rea*' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention

[1] Jickling on the Analogy between Legal and Equitable Estates and Modes of Alienation, Preface, x. xi.; Phelps' Juridical Equity, ss. 239, 167, 168.

[2] 36 and 37 Victoria, chap. lxvi. s. 25.

[3] 1 Pomeroy's Equity Jurisprudence, 1st ed. ss. 276–278, 182.

[4] Reg. *v.* Sleep, 8 Cox Cr. Cas. 472, p. 477.

[5] L. R. 23 Q. B. D. 168, p. 185, 186.

to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed, to describe a mere absence of mind as a '*mens rea*,' or guilty mind. The expression, again, is likely to, and often does, mislead. To an unlegal mind it suggests that, by the law of England, no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime. . . .

"Like most legal Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule." [1]

In Sir J. F. Stephen's "History of the Criminal Law of England," published in 1883, it is said: [2]—

"The truth is that the maxim about '*mens rea*' means no more than that the definition of all, or nearly all, crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. . . . Hence the only means of arriving at a full comprehension of the expression '*mens rea*' is by a detailed examination of the definitions of particular crimes, and therefore the expression itself is unmeaning." [3]

Bacon's celebrated maxim relative to *ambiguitas latens* has already been sufficiently discussed in this journal. The maxim "figured as the chief commonplace of the subject for many years. It still performs a great and confusing function in our legal discussions." But Professor Thayer (who does not stand alone in this view) pronounces it "an unprofitable subtlety;" "inadequate and uninstructive." [4]

A maxim which is really true, and useful in its place, may be overestimated; and the result is to stifle inquiry upon important points. Thus the phrase, *In jure, causa proxima, non remota,*

[1] In the same case, p. 181, Cave, J., speaks of this maxim as "somewhat uncouth," and Manisty, J., p. 201, expresses his concurrence with portions of the criticisms of Stephen, J.

[2] Vol. ii. p. 95.

[3] But compare Mr. Endlich's article on "The Doctrine of *Mens Rea*," 13 Criminal Law Magazine, 831; and 1 Bishop's New Criminal Law, ss. 287, 288, 303 *a*, note 6, paragraph 2.

[4] 6 HARVARD LAW REVIEW, 417–440; especially 424, 436, 437, 438.

spectatur, is by no means to be banished from the law. But it does not follow that the citation of this maxim, even with the addition of the first paragraph in Bacon's well-known gloss, will afford an all-sufficient statement of the reasons for every decision upon a question of juridical cause. The maxim may properly be used as a starting-point, but it should not be mistaken for the goal. It "does not help us to tell when a cause is proximate, and when remote."[1] Taken literally, it would seem to put material antecedents on an equal footing with voluntary and responsible human actors. So also it might be understood as implying that the antecedent which is "nearest in time or space" is invariably to be regarded as the legal cause.[2]

Maxims relating to the interpretation of written instruments occupy (with the comments upon them) more than one-seventh of Mr. Broom's book. Yet these maxims, standing alone and taken as absolute statements, are liable to gross misuse. Most of them are, at the utmost, only *prima facie* rules; "good servants, but bad masters." A rule of construction should always be understood as containing the saving clause, "unless a contrary intention appear by the instrument."[3]

So, too, there are maxims intended to be applied only as last resorts in emergencies; but which purport on their face to carry controlling weight under all circumstances. An illustration of this class is afforded in the following extract from the opinion of Finch, J., in the recent case of Rapps *v.* Gottlieb.[4]

"A further argument is made founded upon the doctrine that, where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done; but that doctrine applies only in an emergency. It solves problems which have no other solution; it supplies a ground of decision where all others are absent; it operates as a reason when nothing else can master the situation; it is a rule of last resort, applicable only where all others fail; it is a doctrine subordinate and not dominant, which reverses no other, but submits to the authority of all, and is adequate to an ultimate decision only when it has the field to itself. Any wider view of it would make it a disturbing force, tending to unsettle and destroy the most firmly fixed doctrines of the law. It is good and useful, — in its place, — but will always make

[1] 4 Am. & Eng. Encyclopædia of Law, 25, note.

[2] See Thomas, J., in Marble *v.* Worcester, 4 Gray, p. 409. Compare Cooley on Torts, 2d ed. 88.

[3] See Preface to Hawkins on Wills.

[4] 142 N. Y. 164, 168.

trouble if not kept where it belongs. . . . If it is always remembered that the doctrine as to innocence on both sides operates only when other solutions are not available, or possibly in aid of proper solutions, very much of needless confusion will be avoided."

There are phrases to be found in some collections of so-called legal maxims which were not intended by their original framers as statements of "law." They are "merely moral rules, which do not obtain as positive law." [1] Doubtless "the law rests its foundations on morality, but it does not cover all morality; . . ." and while there is "no conflict" between the rule of law and the rule of morals, "the latter is broader than the former." [2] A writer on jurisprudence may have enunciated as rules "whatever maxims of justice or utility approved themselves to him as an individual moralist." [3] It is sometimes difficult to discover whether such authors "are discussing law or morality;" "whether they lay down that which is, or that which, in their opinion, ought to be." [4] What they believe ought to be law is liable to be treated by them as if it were law already; although it has never been made the basis of judicial action, and is not soon likely to be. But a proposition can properly be called "law" only when, and so far as, it is enforceable by the courts.

In this connection it should be noticed that "many of the sayings that are dignified by the name of maxims are nothing but the *obiter dicta* of ancient judges who were fond of sententious phrases, and sometimes sacrificed accuracy of definition to terseness of expression." [5] Moreover, a statement intended as a maxim may have gained currency as such out of deference to the reputation of its author, rather than by reason of its intrinsic correctness as a faithful representation of existing law. Thus it has been said of Bacon's misleading maxim relative to *ambiguitas latens:* "The great name of the author of the maxim gave it credit. . . . When this was found clothed in Latin, and fathered upon Lord Bacon, it might well seem to such as did not think carefully that here was something to be depended upon." [6]

It is not unreasonable to suppose that the old sages, in some instances, intentionally overstated a truth for the purpose of attract-

[1] See J. S. Mill's Review of Austin on Jurisprudence, 118 Edinburgh Review, 161.

[2] Bishop's First Book of the Law, ss. 16 and 17. (It is to be regretted that this useful work should have been so long out of print.)

[3] 118 Edinburgh Review, 461.

[4] Maine's Ancient Law, 1st Eng. ed. 98.

[5] 3 New Jersey Law Journal, 160.

[6] 9 HARVARD LAW REVIEW, 437.

ing attention. "A certain pleasant exaggeration, the use of the figure hyperbole, a figure of natural rhetoric which Scripture itself does not disdain to employ, is a not unfrequent engine with the proverb for the arousing of attention and the making of a way for itself into the minds of men." [1] But, in making practical application of so-called legal maxims, sufficient care has not always been taken to distinguish between the exaggeration and the reality.

"Legal maxims do not change; they are the fundamental principles of law, and therefore no alterations in them can be noted. . . ." Such is the claim made in the preface to a recent collection of maxims.[2] This statement apparently assumes, first, that all prominent legal maxims are correct representations of fundamental principles of law; second, that these so-called "fundamental principles of law" never change. The first assumption is not well founded, as appears from the extracts we have already given from high authorities. Nor is the second assumption correct, unless the term "fundamental principles of law" is so defined as to restrict the class to a very small number. On some subjects the law crystallized too early. Courts attempted to lay down hard and fast rules, which it has been impossible to adhere to. Notwithstanding the efforts made by some tribunals to conceal the fact that the law was being altered by their decisions, it is undeniable that the law has been changed in respect to points formerly considered essential. In very recent times some judges have had the frankness to admit this. A "system of unwritten law," said Chief-Justice Cockburn, "has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied." [3] It cannot be questioned that some maxims which were once "law" are so no longer. They grew out of a state of society now happily obsolete. They are paraphrases of doctrines first adopted in barbarous ages, but which no longer obtain. Or they are deductions from those cast-off principles; "and the conclusions at which they arrive

[1] "Proverbs, and their Lessons," by Archbishop Trench, 7th Eng. ed. 25.

[2] Wharton's Maxims, 2d ed., Preface, vi.

[3] Wason *v.* Walter, L. R. 4 Q. B. 73, p. 93. Compare the admirable opinion of Lord Hobhouse in Smart *v.* Smart, L. R. (1892), Appeal Cases, 425; which is throughout an illustration of the above statement.

being logical consequences of their imperfect principles, necessarily partake of the same defects." [1] At the present day, such maxims are not safe guides.

If the foregoing criticisms are well founded, how shall we account for the fact that various objectionable maxims keep their place in the books, and are daily quoted by eminent jurists. One answer to this inquiry is suggested by the remark of Sir Henry Maine, that "legal phraseology is the part of the law which is the last to alter." [2] The most ardent law reformers, in spite of the Scriptural warning against putting new wine into old bottles, sometimes prefer to give a new interpretation to an old phrase rather than attempt the almost "impossible task of blotting it out of our jurisprudence." [3] Even Austin, who did not hesitate to apply to some existing terms such an epithet as "jargon," is not inclined to unnecessarily "engage in a toilsome struggle with the current of ordinary speech." [4] "Mr. Austin," says John Stuart Mill, "always recognizes, as entitled to great consideration, the custom of language, — the associations which mankind already have with terms; insomuch that when a name already stands for a particular notion (provided that, when brought out into distinct consciousness, the notion is not found to be self-contradictory), the definition should rather aim at fixing that notion, and rendering it determinate, than attempt to substitute another notion for it." [5]

"What," it may be asked, "does all this criticism amount to but a mere restatement of the trite saying, *Omnis definitio in jure periculosa est?* What objections are there to maxims, what dangers connected with their use, which do not apply with equal force to all legal definitions, and indeed to all attempts to state the law in any form?" We reply that if the difference is only one of degree, it does not follow that such difference is unimportant, or that it does not call for serious warning. Undoubtedly all jurists who undertake to formulate statements of law, no matter in what shape, must labor under great difficulties, arising (*inter alia*) from the combined effect of "the poverty of language" and "the subtlety of human nature." But there are especial reasons why the dangers in the use of maxims are practically much greater than the dangers when the law is stated in other modes. And of these reasons, two, at least, deserve particular mention.

[1] Austin on Jurisprudence, 3d ed. 1116.
[2] Maine's Ancient Law, 1st Am. ed. 327.
[3] See 13 Criminal Law Magazine, 832.
[4] 1 Austin on Jurisprudence, 3d ed. 93.
[5] 118 Edinburgh Review, 453.

First, and most important, is the difficulty alluded to at the outset, and perhaps already sufficiently dwelt upon, viz., the danger necessarily arising from brevity. While agreeing with the Law Quarterly Review, that "it is hardly fair to find fault with a maxim for its brevity," one must also agree with the further statement of the Review, that "brevity should make us beware."[1] Not only is the meaning of short phrases peculiarly liable to misapprehension, but there are frequent mistakes as to their scope and application. Lord Bacon said: "This delivering of knowledge in distinct and disjoined aphorisms does leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications."[2] But there is certainly the accompanying danger that "the wit of man" is very likely to turn and twist these aphorisms to purposes not intended by their framers.

Second, the fact that the great majority of legal maxims are clothed in the words of a dead language has had, in some instances, the effect of preventing proper inquiry into their meaning. A phrase couched in Latin seems to some persons invested with "a kind of mysterious halo." Of course Judge Lord was right when he said: "There is nothing of mystery or of sanctity in the words of a dead language."[3] But no one who reflects on the subject can doubt that some useless Latin maxims, and some untrue Latin maxims have continued current, and that other Latin maxims have been misapplied, when this would not have happened if those maxims had been expressed only in the vernacular. How else can we account for the way in which certain phrases are put forward as containing the reason for a rule, when the same phrase reduced into plain English is obviously nothing more than a restatement of the rule itself? A phrase, when put to such a use, may fairly be characterized as a "question-begging maxim." It is not an explanation; "it is merely an artificial statement of the thing to be explained;"[4] it is "dogma, not reasoning."

Lord Bacon tells us that he put the maxims in Latin, because he regarded that language "as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument."[5] No

[1] 5 Law Quarterly Review, 444. [2] Preface to Bacon's Maxims of the Law.
[3] 125 Mass. p. 335, in reference to the words, "*ultra vires*."
[4] See Pollock's Essays in Jurisprudence and Ethics, 118.
[5] Preface to Bacon's Maxims of the Law.

doubt these advantages are entitled to consideration; but there is the obvious disadvantage that maxims "put in Latin" will be more liable to be misunderstood by the average lawyer than by a man of Bacon's scholarship. And although the maxims have now been translated by modern editors, yet they are still generally cited in their Latin garb.

It is time to bring this discussion to an end. What, then, is the conclusion of the whole matter? Shall we say that Mr. Broom's book should be burned by the common hangman; and that the citation of maxims in courts of justice should be forbidden by a legislative enactment framed upon the model of the statute passed in the early days of Kentucky, prohibiting the citation of English decisions.[1] Far from it. On the contrary, Mr. Broom's excellent work should be in the library of every practitioner; and all lawyers should familiarize themselves with the leading maxims, which have the great merit of being "easily learned and not easily forgotten." But it should always be remembered that these familiar phrases are not all of equal value; that some ought to be amended, and others discarded altogether. Above all, it should be remembered that these maxims (even the best of them) are only maxims; that they are "not meant to take the place of a digest;"[2] that they are neither definitions nor treatises;[3] that while they are "a convenient currency," yet "they require the test from time to time of a careful analysis;"[4] and that, in many instances, they are merely guide-posts pointing to the right road, but not the road itself.

Jeremiah Smith.

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[1] Schurz's Life of Henry Clay, 49–50; Dembitz, Kentucky Jurisprudence, 7, 8.

[2] 5 Law Quarterly Review, 444.

[3] See 13 Criminal Law Magazine, 832.

[4] 5 Law Quarterly Review, 444.